so based on a forecast of additional revenues to be received and operational costs versus the capital costs incurred for the upgrade. The "switching platform" proposal would deprive the ILEC of significant revenues including those from switched access and vertical features. Without these revenues, the ILEC could not justify switch upgrade decisions either to regulators or to investors. Thus, mandating such a platform would be confiscatory and should not be considered. Congress did not intend to deprive ILECs of these legitimate and significant revenues.

8. The Proposed Definition Of A "Port" Is Misplaced. (NPRM - II.B.2.)

The NPRM seeks comment on defining a "port" as including all the capabilities of the local network provided at the main distribution frame of a LEC central office.[72] Further, the Commission seeks comment on whether the "port" should be separate from the switch.[73] SBC supports the Commission's proposal to the extent that it considers the "port" separate from the switch. However, the Commission should define a "port" or switch port as an <u>entrance</u> to the switch. SWBT's switch port consists of the SWBT central office switched hardware (line card) and software required to permit end users to originate and terminate calls and to connect to trunks for originating and terminating calls to the public switched network. A switch port provides <u>access</u> to the basic functionality of the switching components of an ILEC's network, but should not be deemed to include

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[72] NPRM, para. 101.

[73] <u>Id</u>.

all switch functions that reside within the switch. That would constitute much more than a "port."

9. AIN Unbundling Matters (NPRM - II.B.2.)

The Commission seeks comment on the importance of unbundled access to ILEC advanced call processing features.[74] The ILECs' call processing services are currently provided in three distinct ways: switch based, e.g., CLASS℠; Intelligent Network I (IN1), e.g., 800 service; and Advanced Intelligent Network (AIN). Switch based and IN1 services are very service-specific in their design. AIN network elements, on the other hand, are not accessed at the physical level and will require highly dependable forms of mediation before they can be accessed logically by competitors in order to safeguard network integrity, service assurance and overall network reliability.[75] Tier 1 LECs have proposed a cooperative industry "IN Project" to use lab tests and field trials to determine the technical requirements and technical feasibility associated with mediated access to LECs' intelligent network functionalities.[76] The Commission should rely on the industry to resolve issues associated with AIN call processing services provided via remote databases. Uniformity, although desirable, may not be attainable across all networks due

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[74] NPRM, para. 111.

[75] Intelligent Networks, Notice of Proposed Rulemaking, 8 FCC Rcd 6813 (1993), Section II, paras. 4-5.

[76] Ex Parte letter from Sandra Wagner, Director, Federal Regulatory, SBC Communications Inc., to William F. Caton, Acting Secretary, FCC (June 23, 1995).

to differences in technologies, network design and markets. Furthermore, services enabled by technologies such as AIN (e.g., Single Number Service) are not "network elements." They should be available under the resale provisions of the Act.

The Commission also seeks comment on whether the connection of third party call processing databases to the ILECs' networks is a form of interconnection that is technically feasible ("without jeopardizing network realizability").[77] The various scenarios (referred to as AIN) under which a competitor might connect its own call processing database (e.g., Service Control Point (S.C.P.)) to an ILEC's network have been the subject of extensive investigation by the Commission in CC Docket No. 91-346. The record in that proceeding is replete with evidence demonstrating the current technical infeasibility of such arrangements.[78] The current state of technology simply does not accommodate such arrangements.

The Commission further seeks comment as to whether mandating the unbundling of similar systems and databases is sufficient to meet the objectives of the IN proceeding and whether it should use its Section 201 authority to require such access.[79] As stated previously, the record in CC Docket No. 91-346 contains overwhelming evidence that

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[77] NPRM, para. 112.

[78] Ex Parte filings made by GTE on September 15, 1995, Pacific Bell on December 5, 1995, and SWBT on January 11, 1996.

[79] NPRM, para. 114.

third party access to a LEC's AIN network elements (these include "call processing databases") is not technically feasible absent significant further development of mediation capabilities. Notwithstanding some claims to the contrary, the record more than adequately demonstrates the network risk associated with providing access to the LECs' AIN network elements absent adequate mediation capabilities. The Commission, in its order in CC Docket No. 91-346, should issue final rules that endorse the Tier 1 LECs' joint proposal for an industry IN project as the path forward in moving toward more open access to the LECs' intelligent network elements. The Commission should not merge that docket into this docket since the record over the last three years in that docket is complete today. Cooperation among industry participants, not regulatory mandate, will facilitate the earliest resolution of interconnection issues. The process intended by the Act will drive the deployment of solutions worked out as a result of industry negotiation.[80]

10. Databases And Signaling Systems (NPRM - II.B.2.)

Network interconnection to the SS7 Signaling Network takes place at the Signal Transport Point (STP) via either an "A" or a "B" link connection. LSPs can elect to

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[80] On December 8, 1995, absent any order by the Commission, in response to market demand, BellSouth filed a Part 69 waiver request to allow it to offer open access to its intelligent network via its Service Management System (SMS) using its proprietary Service Creation Environment (SCE) known as "Design Edge." This demonstrates that, where sufficient market demand exists for access to a certain ILEC network capability, the ILEC will respond by voluntarily offering that access. However, as stated earlier, the mere fact that one ILEC has offered the access arrangement does not mean that it is "technically feasible" for other ILECs.

connect to SWBT's SS7 Signaling Network with direct "A" or "B" link access, or can use a third party vendor that has "B" link SS7 connectivity to the various SWBT local STPs in the areas to be served. SWBT requires certification[81] of any new company and switch types that desire SS7 interconnection to protect the integrity of the SWBT network. However, certification alone is not sufficient protection. It only ensures that carriers comply with the SS7 interconnection standards. The procedure includes: ordering the SS7 facilities; completing the SS7 testing and network applications; participating in pre-certification meetings; and the actual testing.

Signal Control Points (SCPs) are remote databases that store information for routing and call identification capabilities. There is no direct interconnection path to the SCPs. Queries for database information originate from SSPs in SWBT's network or SSPs in interconnected networks, and all signal via the same STP mated pair associated with the SCP. Absent significant further development of mediation capabilities[82] it is technically infeasible for signaling messages other than CLASS or IN1 related messages to traverse interconnected SS7 network links.

LSPs that wish to gather information from the SCPs in addition to being certified by SWBT to gain access to its SS7 network must also enter into contractual agreements for information access, to ensure that the system capacity limits are not exceeded and to

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[81] TR-TSV-000905 and SWBT's Supplement Technical Publication 76638.

[82] NPRM, para. 111.

verify that billing recording takes place properly on each type of database query desired by the LSP. This certification process, however, is limited in scope and content. It provides for certification for basic call set up. It does not provide for certification of AIN-type messages that can vary on a call-by-call basis.

The Commission should carefully take into account the technical differences between ILECs' network and the importance of standards issues in making all technical feasibility determinations under the Act.

B. Interconnection Compensation (NPRM - II.C.5)

1. The Commission Need Not Establish Compensation Principles. (NPRM - II.C.5.)

a. The Framework Is Statutory And Structured. (NPRM - II.C.5.)

The Act moves interconnection negotiations to a highly structured framework which is not dependent upon detailed regulations. This is particularly true with respect to compensation. Although the procedures for evaluating interconnection agreements are subject in some respects to this legislatively mandated rulemaking,[83] the basic principles, including compensation principles, are statutory.

Specifically, Section 251(a) requires, in part, that "[e]ach telecommunications carrier . . . interconnect directly or indirectly with the facilities and equipment of other

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[83] 47 U.S.C. Section 251(d).

telecommunications carriers."[84] ILECs must provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252."[85] Section 251 (b)(5) requires that each LEC "establish reciprocal compensation arrangements for the transport and termination of telecommunications."[86]

Binding agreements for interconnection and reciprocal compensation may be reached between ILECs and requesting telecommunications carriers pursuant to voluntary negotiations "without regard to the standards set forth in subsections (b) and subsection (c) of section 251."[87] When submitted for approval by a state commission,[88] the negotiated agreement <u>must</u> be approved unless it discriminates against a third-party telecommunications carrier or the implementation of the agreement is not consistent with the public interest; a state commission may reject an agreement that contains terms adopted through the arbitration process <u>only</u> if it fails to meet the requirements of Section 251 or the pricing standards of Section 252.[89]

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[84] 47 U.S.C. Section 251(a)(1).

[85] 47 U.S.C. Section 251(c)(2)(D).

[86] 47 U.S.C. Section 251(b)(5).

[87] 47 U.S.C. Section 252(a)(1).

[88] Or in certain circumstances, by the Commission. 47 U.S.C. Section 252(e)(5).

[89] 47 U.S.C. Section 252(e)(2).

Provided that the prices established in the negotiated agreement do not discriminate against third-party telecommunications carriers and are consistent with the public interest, neither the state commission nor the Commission has a role in determining appropriate compensation. Where a state commission, or this Commission, is required to arbitrate elements of an otherwise negotiated agreement, it is to determine compensation for interconnection service[90] and compensation for the transport and termination of calls[91] based upon pricing standards set forth in Sections 252(d)(1) and (2).[92] These pricing standards -- to be used only in the absence of a negotiated agreement -- are complete. Thus, there is no need for the Commission to set pricing standards.

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[90] "Interconnection service," priced under Section 252(d)(1), permits the physical connection of the facilities and equipment of a requesting telecommunications carrier to the ILEC network. Although subject to negotiation, interconnection service in this context would typically be flat-rated, similar to an entrance facility under the local transport restructure.

[91] "Transport and termination service" permits the completion of calls originated by an end user on the requesting telecommunications carrier's network and terminated to an end-user customer on the ILEC's network (or vice-versa). The purchase of transport and termination services presupposes the purchase of "interconnection service," but is required for the completion of calls to ILECs' and requesting telecommunications carriers' end users. Because "transport and termination" can be accomplished through either tandem or end-office interconnection, some "transport and termination" services will incur more transport costs than others. Both interconnection and transport and termination services are necessary for network interoperability, and both services are currently sold to, for instance, Commercial Mobile Radio Service (CMRS) providers that terminate calls placed by their customers to end users on ILEC networks. Although subject to negotiation, transport and termination would typically be subject to usage-sensitive rates.

[92] 47 U.S.C. Sections 252(d)(1) and (2).

b. Mandated Rate Structures Are Not Intended By Congress. (NPRM · II.C.5.)

In particular, the Commission has requested comment on whether it can or should mandate symmetrical rate structures or bill-and-keep.[93] Congress has made it clear that no specific interconnection rate structure, including either a symmetrical rate structure or bill-and-keep, can be imposed upon interconnecting telecommunications carriers. Through its procedures for the negotiation, mediation, arbitration, and agreement approval process, the Act sets pricing standards that are to be used when there is no agreement among ILECs and requesting telecommunications carriers on interconnection compensation. In this context, the just and reasonable rate for interconnection service is to be cost-based and non-discriminatory and may include a reasonable profit.[94] The rates for transport and termination service are to be just and reasonable and are to recover costs based upon a reasonable approximation.[95]

Mandated symmetrical rate structures and mandated bill-and-keep do not meet the Act's requirements. First, neither mandated symmetrical rates nor mandated bill-and-keep ensure "the mutual and reciprocal recovery by each carrier of costs associated with

[93] NPRM, paras. 235-38 (symmetrical rate mandate discussion) and 243 (bill-and-keep discussion).

[94] 47 U.S.C. Section 252(d)(1).

[95] 47 U.S.C. Section 252(d)(2)(I).

transport and termination."[96] As such, neither could be imposed upon the parties except in violation of the cost and price safeguards of the Act.

Second, with regard to whether bill-and-keep should or can be mandated, while the Act specifically permits agreements among interconnecting LECs that "waive mutual recovery (such as bill-and-keep arrangements),"[97] any such arrangement must be the voluntary result of negotiation and the decision of the parties to accept such "rates." Importantly, by inserting the concept of "waiver" into this area, Congress has clearly prescribed a consensual, wholly voluntary act. Compulsion is antithetical to any concept of waiver. Concluding that ILECs can be forced to bill-and-keep or to enter into any other specific compensation arrangements would be inconsistent with the hierarchy of burdens and benefits created by the Act.[98] Section 252 simply permits a state commission -- or the Commission in the event a state commission fails to act -- to approve such voluntary arrangements as "just and reasonable." Neither bill-and-keep nor any other

[96] 47 U.S.C. Section 252(d)(2)(A)(I).

[97] 47 U.S.C. Section 252(d)(2)(B)(i).

[98] Telecommunications carriers have certain duties, non-incumbent LECs have additional duties, and incumbent LECs have even more duties. Given that incumbent LECs cannot be required to accept bill-and-keep or other compensation arrangements under the 1996 Act, clearly the less burdened non-LEC telecommunications carriers should not be handed that tremendous benefit by regulatory fiat.

specific pricing standard can or should be mandated by the Commission through this NPRM or as a product of the Section 252 process.[99]

c. Agreements With Non-Competing Neighboring LECs Do Not Fall Under Sections 251 And 252. (NPRM - II.B.2.)

The Commission also requests comment on whether existing contracts among non-competing, neighboring ILECs are subject to the non-discriminatory rate provisions of Section 251(c)(2) or the reciprocal compensation duty under Section 251(b)(5).[100] Interconnection agreements between ILECs and non-competing neighboring LECs are not agreements between an "incumbent LEC" and a "requesting telecommunications carrier" for the purpose of providing competing "telephone exchange service and exchange access." Instead, the agreements operate between ILECs for the transport and termination of calls to end users in mutually-exclusive, state-certified franchise areas.

The Act reflects that Congress did not intend to modify agreements between non-competing ILECs. Instead Congress intended to promote competition between ILECs

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[99] The Commission has also requested comment on the terms of contracts governing settlements among neighboring ILECs, which the Commission contends are often bill-and-keep. First, very few of SWBT's agreements with neighboring ILECs are bill-and-keep. Second, the specific bill-and-keep arrangements that exist were put into place either after a state commission order or after they were negotiated based upon established traffic patterns and established costs of each ILEC. These agreements, therefore, do not translate into a competitive context where neither established traffic patterns or defined costs exist.

[100] NPRM, paras. 170-71.

and new entrants within ILEC exchanges.[101] This purpose is not advanced by application of the requirements of Section 251(c) or Section 251(b)(5) to neighboring ILECs that do not compete with one another.

While neighboring ILECs certainly may compete with one another, their existing agreements continue to be effective under the Act. Because they are not competing carriers, these contracts are not pertinent to the agreements reached between ILECs and requesting telecommunications carriers. To the extent the relationship changes, and ILECs begin to compete with one another, their newly negotiated agreements will be subject to Sections 251(c)(2) and 251(b)(5).

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[101] Conference Report at 117, which states that "[n]ew subsection 251(a) imposes a duty on local exchange carriers possessing market power in the provision of telephone exchange service or exchange access service in a particular local area to negotiate in good faith and to provide interconnection with other telecommunications carriers that have requested interconnection for the purpose of providing telephone exchange service or exchange access service." The Conference Report also states that "Section 242(a)(1) sets out the specific requirements of openness and accessibility that apply to the LECs as competitors enter the local market and seek access to, and interconnection with, the incumbent's network facilities . . . ." Id. at 120. Section 242(b)(1) describes the specific terms and conditions for interconnection, compensation, and equal access, which are integral to a competing provider seeking to offer local telephone services over its own facilities.

2. The Framework For Accomplishing Interconnection Is Specified As Request, Negotiation, Mediation, Arbitration, And Submission For Approval. (NPRM - II.A.)

a. The Role Of Traditional Regulatory Processes Is Limited. (NPRM - II.A.)

Congress did not intend that agreements establishing reciprocal compensation be obtained through traditional regulatory processes. Rather, Sections 251 and 252 of the Act create a "new model for interconnection."[102] The distinguishing principle of the new model is that interconnection arrangements between telecommunications carriers are to be negotiated and determined by agreement, subject where necessary to arbitration by state commissions. The Commission's role is largely limited to implementing procedures necessary for the operation of the Act and resolving specific disputes where the states fail to do so within the time frames prescribed by the Act. The Commission can adopt procedural guidelines pursuant to the Act's requirements, but it may not impose additional substantive obligations;[103] in particular, the Commission cannot impose a substitute for negotiations in the context of intercarrier agreements nor mandate a substantive resolution of issues subsumed within Sections 251 and 252.

From the day that the Act became effective, therefore, all ILECs have operated under the legislated duty to negotiate the particular terms and conditions of agreements

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[102] Id. at 121.

[103] Except as described in Section III.A.1., supra.

for interconnection with all requesting telecommunications carriers.[104] These negotiations are required to be conducted in good faith and in accordance with the other provisions of the Act.[105] All telecommunications carriers[106] seeking interconnection arrangements with ILECs are under a corresponding duty to negotiate in good faith.[107] These duties, while supplemental to those imposed directly by Section 201 of the Communications Act and Commission proceedings brought under that section,[108] are subject to a specific, detailed, and self-implementing mechanism described within Section 252.

The process specified for reaching agreements for interconnection and compensation requires:

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[104] 47 U.S.C. Section 251(c)(1).

[105] Id.

[106] The term "telecommunications carrier" is defined in the Act to mean "any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). . . ." 47 U.S.C. Section 153(44). The term telecommunications carrier includes CMRS providers that seek interconnection with ILECs. The term "LEC" has been expanded under the 1996 Act from its ordinary usage to include, as well, (a) non-"incumbent" providers of telephone exchange service or exchange access service, and (b) CMRS providers, should the Commission determine it appropriate. 47 U.S.C. Section 153(26). CMRS providers that interconnect voice-grade services are "telecommunications carriers" that provide "telephone exchange service." NPRM, paras. 166-69; 47 U.S.C. Sections 153(44), (47).

[107] 47 U.S.C. Section 251(c)(1).

[108] 47 U.S.C. Section 201(i).

Step 1: A request from a telecommunications carrier to negotiate;[109]

Step 2: Voluntary, good faith negotiations of all relevant terms with or without regard to the standards of Section 251;[110]

Step 3: State commission participation in the negotiation process and mediation of differences, if requested; [111]

Step 4: State commission arbitration of necessary terms left unresolved by the negotiation (and mediation) process, if required;[112]

Step 5: The parties' submission to a state commission of any agreement reached after negotiation and agreement, or after negotiation, arbitration and agreement.[113]

No other process is authorized, and no other standards are permitted, by the Act. If there is an agreement on the compensation arrangement, the review provided by the state commission is only as to whether that agreement discriminates against a non-party telecommunications carrier, or whether it is inconsistent with the public interest, convenience, and necessity.[114] The Act does not permit the state commission to impose its

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[109] 47 U.S.C. Sections 252(a)(1); 251(c)(1), and (2) (voluntary negotiations "[u]pon receiving a request" from a "requesting telecommunication carrier").

[110] Id.

[111] 47 U.S.C. Section 252(a)(2).

[112] 47 U.S.C. Section 252(b), (c), (d).

[113] 47 U.S.C. Section 252(e).

[114] 47 U.S.C. Section 251(e)(2)(A).

view of what is "just and reasonable" upon two carriers that have negotiated a mutually beneficial arrangement.

Only if there is arbitration on the compensation issues can the state commission decide just and reasonable compensation for both carriers. Even then, the regulatory treatment of rates for reciprocal compensation for transport and termination of calls is to be based upon "a reasonable approximation of the additional costs of terminating such calls."[115] Most significantly, Section 252(d)(2)(B)(ii) specifies that neither the Commission nor any state commission is "to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls."[116]

3. SBC's Position Is Entirely Consistent With The Policies It Urged In CC Docket No. 95-185. (NPRM - II.C.5.)

The Commission's stated long-term policy goal for interconnection pricing, including reciprocal compensation, is obtaining equivalent prices for functionally equivalent services, unless there are cost differences or policy considerations that justify different rates.[117] As shown in SBC's Comments and Reply Comments in Docket 95-185,

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[115] 47 U.S.C. Section 252(d)(2)(A)(ii) (emphasis added).

[116] 47 U.S.C. Section 252(d)(2)(B)(ii).

[117] In the Matter of Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, Equal Access and Interconnection Obligations Pertaining to Commercial Radio Services Providers, CC Docket No. 95-185, Notice of (continued...)

the Commission's stated goal of obtaining in the future equivalent pricing for functionally equivalent services (i.e., "minute is a minute" pricing) is both important and achievable. However, to reach its stated goals, the Commission must institute and complete several vital, interrelated proceedings. The "Regulatory Task List,"[118] the elements of which are indispensable to the introduction of full and fair competition to the telecommunications services marketplace, includes all of the Commission and state regulatory rulemakings or other initiatives which reduce the amount of implicit universal service support and carrier-of-last-resort obligations in LEC access and toll charges. The Regulatory Task List includes, but is not limited to, proceedings to accomplish access charge structure reform and local exchange carrier rate rebalancing and geographic rate deaveraging to the extent permitted by law.[119]

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[117](...continued)
Proposed Rulemaking, ("Docket 95-185") (Released January 11, 1996), para. 4.

[118] SBC Comments in Docket 95-185, n. 50.

[119] In conjunction with questions relating to "other issues," the Commission requests comment on the extent to which embedded or historical costs and universal service support flows should be recovered as costs of interconnection and transport and termination services in conjunction with the pricing principles of Section 252(d). NPRM, paras. 144-45. SBC supports the continued inclusion of embedded or historical costs and universal service support within interconnection and transport and termination service rates pending the completion of Regulatory Task List proceedings, provided that such costs and support are established and made as explicit as possible. SBC would point out, however, that recovery of the true costs of a service should not be confused with the continuation of universal service support flows. While both should be recovered and both are a product of the history of the regulation of telecommunications service, they are not
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As the Commission proceeds with this docket, it must be guided by the principle that interconnection policy -- and in particular, compensation policy -- cannot properly be implemented except in concert with those proceedings encompassed by the Regulatory Task List. While the universal service docket has begun,[120] it and the necessarily related proceedings are long from being concluded. Most of the other proceedings subsumed within the Regulatory Task List have yet to be commenced. While the Commission may not, as it tentatively concluded in the NPRM, institute rules that require any particular form, terms, conditions, or rates for interconnection, it can and should move forward expeditiously to complete the additional proceedings necessary to bring full and fair competition to the telecommunications industry.

C. Collocation (NPRM - II.B.2.)

SBC supports the concept of physical collocation, using the general structure for such arrangements that was previously adopted by the Commission. However, the NPRM erroneously presumes that the Commission can expand the concept of physical collocation.

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[119](...continued)
the same.

[120] In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Notice of Proposed Rulemaking (Released March 8, 1996).

1. The Commission Cannot Expand Physical Collocation Beyond Its Existing, Limited Definition. (NPRM - II.B.2.)

By the language of the Act, an ILEC only has a duty to provide physical collocation to eligible carriers requesting (1) interconnection, or (2) access to unbundled elements under Section 251. The duties to provide interconnection and unbundled elements run only to requesting carriers.[121] Physical collocation is a duty strictly tied by the very language of Section 251(c)(6) to those two other duties created by the Act. Beyond those instances authorized by the Act, the holding of Bell Atlantic v. FCC[122] remains, and the Commission is without authority to require that physical collocation be provided for other purposes or to other entities (e.g., end-users, enhanced service providers). Congress made a conscious decision to use the term "physical collocation" in the Act and did so in the face of the previous use of "actual collocation" in both the House and Senate bills.[123] The term "physical collocation" has been previously defined by the Commission. Under that existing and industry-understood meaning, physical collocation involves the placement of "basic transmission facilities, including optical terminating equipment and multiplexers, within or upon the local exchange carrier's central office buildings" in order to provide expanded interconnection and "subject to reasonable terms and conditions, to

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[121] 47 U.S.C. Sections 251(C)(2) and (3).

[122] 24 F.3d 1441 (D.C. Cir. 1994).

[123] H.R. 1555, Section 242(b)(4)(C); S. 652, Section 251(h).

install, maintain, and repair the equipment . . . allocated on a first-come, first-served basis."[124] By using the term "physical collocation" without otherwise defining it in the Act, Congress made a decision to adopt the currently utilized definition of the term. As a matter of statutory construction, "physical collocation" must be read in that context and the statute interpreted accordingly.[125]

Thus, there is no statutory duty to provide physical collocation anywhere except within an ILEC central office or a facility comparable to a central office. Due in part to technical and operational reasons, the Commission had previously determined that physical collocation was essentially limited to central offices or their equivalent for purposes of expanded interconnection.[126] By incorporating the phrase "physical collocation" into the ILECs duty, Congress adopted that concept. In like fashion, there is no duty to permit the placement of equipment other than basic transmission equipment,[127]

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[124] 47 C.F.R. 64.1401(d)

[125] McDermott Intern., Inc. v. Wilander, 111 S.Ct. 807, 112 L.E.2d 866 (1991).

[126] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Transport Phase I, Second Report and Order and Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, 7403-09 (1993) ("Switched Transport Order"); Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, 9 FCC Rcd 5154, 5168 (1994).

[127] Switched Transport Order, 8 FCC Rcd at 7411-13.

or to allow other uses of the basic terminating equipment (beyond expanded interconnection purposes).[128]

Any attempt to expand the meaning of "physical collocation" would run counter to Congress's deliberate use of a term defined within an industry, which would be in contravention of United States Supreme Court decisions, and would also give insufficient weight to the phrase "necessary for interconnection or access to unbundled network elements." The NPRM does not address this factor. In the Physical Collocation Order,[129] the clearest statement on the appropriateness of physical collocation was that

> Section 201(a) authorizes us to order carriers to provide physical interconnections in the public interest, which necessarily empowers us to determine the most reasonable means for implementing interconnections. Physical collocation is a reasonable means of implementation. . . .[130]

A " reasonable means" is not equivalent to "necessary." Indeed, for example, the Commission has previously determined that the placement of switches is not necessary

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[128] The Commission should not lose sight of the implications of any attempt to expand the list of equipment determined to meet the standard of Section 251(c)(6). If some other equipment is determined to be "necessary for interconnection or access to unbundled network elements" such that ILECs have a duty to permit physical collocation for that equipment (for example, a switch), then in the absence of space or if technical reasons exist, virtual collocation of that same equipment will also be required. The Commission should carefully consider the practical consequences of adding to the list of equipment to which virtual collocation applies (e.g., space limitations, training requirements, etc.).

[129] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd. 7369 (1992) ("Physical Collocation Order").

[130] Physical Collocation Order, 7 FCC Rcd at 7479 (emphasis added).

for expanded interconnection.[131] Absent a factual showing of necessity for a specific piece of equipment, there is no duty under Section 251(c)(6) to permit the placement of equipment within an ILEC's central office. Nevertheless, without waiving any objection that it might have, SWBT is willing to provide physical collocation (fiber-connected basic transmission equipment in a central office cross-connected to a SWBT access service on an unbundled basis) in a manner largely consistent with its previous interstate physical collocation tariff and subject to negotiation with the party requesting physical collocation.

2. Physical Collocation Is To Be Negotiated, Not Tariffed. (NPRM - II.B.2.)

At the same time, any duty to provide physical collocation does not equate to the requirement that ILECs tariff such arrangements. If the obligation to negotiate means anything, the term does not contemplate that ILECs be required to tariff these arrangements, including any obligation to provide averaged rates for them. Instead, each request for physical collocation must be negotiated to allow the parties to address their

[131] Switched Transport Order, 8 FCC Rcd at 7412-13.

unique requirements.[132] As SWBT has demonstrated in its collocation filings,[133] each arrangement is different and can entail vastly different activities and expenses. The imposition of averaged prices for physical collocation resulted in SWBT being unable to recover its actual out-of-pocket expenses due to the problems associated with estimating contractor costs on an "average" basis for various central offices and erroneous interconnector forecasts.[134] Allowing the good faith negotiation/arbitration/approval process to work with physical collocation will most likely address (if not eliminate) each

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[132] Relying upon negotiations rather than tariffing also avoids the interstate/intrastate jurisdictional issue that has been the subject of two recent ex partes by MFS. See letters to William F. Caton, Secretary of the Commission, from Mark P. Sievers on behalf of MFS, dated April 11, 1996, and April 19, 1996. By having a single negotiated agreement to address a collocation arrangement, the terms, conditions, and rates would all be agreed upon, set forth in writing, and approved by a state commission. The multitude of issues raised by MFS's invention of an "apples-to-oranges" calculation to determine the applicable collocation tariff charges, and the unlawful "cherry picking" between intrastate and interstate tariffed terms and conditions that MFS suggests it should be permitted to do, would completely disappear.

[133] See e.g., SWBT's discussion of the differences of equipment in its central offices and its effect on technician training expenses found in its Direct Case and Rebuttal To Oppositions in Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport, CC Docket No. 94-97, Phase II, SWBT Direct Case, pp. 24-28 (filed October 19, 1995).

[134] Based upon a list of central offices where interconnectors projected they would physically collocate, SWBT was required to estimate the cost of central office preparation and average that estimate assuming no fewer than a specific number would eventually collocate in those offices. Due to this form of averaging, SWBT incurred many expenses that remained unrecovered from any interconnector, leaving SWBT's shareholders or customers to pick up the tab. Such confiscation on the behalf of SWBT's competitors is unlawful and should not be permitted again.

of these issues in the factually specific situation in which the collocation request arises, has the best chance of avoiding a Fifth Amendment takings claim,[135] and will result in the timely resolution of the terms and conditions of each arrangement.[136]

3. Forms Of Collocation Other Than Physical Should Be Left To Negotiation. (NPRM - II.B.2.)

By the terms of the Act, virtual collocation is to be either a matter of agreement between the ILEC and a carrier to which the duty runs (e.g., a provider of exchange access or telephone exchange services), or as a default should physical collocation not be an option under the Section 251(c)(6) standard as determined by a state commission.[137] To the extent that the Commission would require virtual collocation and its tariffing, it would be contradicting the will of Congress as expressed by the literal language of the Act.

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[135] While the Act may resolve the question of whether a taking is authorized, it does not (and cannot) address the issue of compensation for any particular taking, for that is a matter expressly left to the judiciary. Florida Power Corp v. FCC, 772 F.2d 1537, 1546 (11th Cir. 1985). To the extent that an ILEC is forced to accept a less-than-compensatory price for its central office space, modified as necessary to provide physical collocation, a taking in violation of the Fifth Amendment will occur. Id.

[136] SWBT notes that its physical collocation tariffs, first filed on February 16, 1993, are still under investigation three years after first submitted and ten months after SWBT withdrew the tariffs on July 14, 1995. As a result, SWBT is carrying unpaid charges of over $335,000 for those arrangements due to an inability to pursue collection activities.

[137] 47 U.S.C. Section 251(c)(6).

V. RESALE RULES SHOULD FOLLOW SPECIFIC LANGUAGE OF THE ACT AND REFLECT CLEARLY STATED CONGRESSIONAL INTENT.

The NPRM risks deviation from the Congressional plan for resale in several important respects. The Commission should focus on the distinct language of the Act in adopting any rules necessary to implement the resale provisions of Section 251.

A. Resale Applies Only To Telecommunications Services. (NPRM - II.B.3.)

Section 251(c)(4)(A) establishes the general duty for ILECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers."[138] By its express terms, then, the resale duty applies only to "telecommunications services," defined by the Act as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[139] The term "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[140] Service offerings that fall outside of that transmission-based definition need not be offered for resale by ILECs. Among those offerings are billing and collection, enhanced billing products, enhanced white page

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[138] 47 U.S.C. Section 251(c)(4)(A).

[139] 47 U.S.C. Section 153(51).

[140] 47 U.S.C. Section 153(48).